Supreme Court, U.S.
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No. 93-432

In The

Supreme Court of the United States

October Term, 1993

JOSE A. MORALES (Deceased/Employee), JULIA CORPUS de MORALES (Widow), JUAN ANTONIO MORALES and DANIEL MORALES (Minor Children),

Petitioners,

v.

BARGE-WAGENER CONSTRUCTION COMPANY
(Employer)
and
ARGONAUT INSURANCE COMPANY
(Insurer),

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court For The State Of Georgia

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF GEORGIA

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No. 93-432

In The

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JOSE A. MORALES (Deceased/Employee), JULIA CORPUS de MORALES (Widow), JUAN ANTONIO MORALES and DANIEL MORALES (Minor Children),

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BARGE-WAGENER CONSTRUCTION COMPANY
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On Petition For Writ Of Certiorari
To The Supreme Court For The
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REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF GEORGIA

I. INTRODUCTION

The Petition for Writ of Certiorari properly invokes this Court's jurisdiction to review important federal equal protection questions incorrectly passed upon by the Georgia Supreme Court and inconsistently resolved by the highest courts of six different states. The Georgia Supreme Court decided this case predicated in significant

part upon its view of controlling Fourteenth Amendment and federal law. The court's decision turned on its view of this Court's decisions in *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990) and *Johnson v. Eisentrager*, 339 U.S. 763 (1950) as well as on the equivalence of the equal protection provisions of the United States and Georgia Constitutions. In sustaining the constitutionality of O.C.G.A. § 34-9-265(b)(5), the Court was required to pass on and reject the merits of petitioners' claims under both the United States and Georgia Constitutions.

II. THE GEORGIA SUPREME COURT'S DECISION DISPOSED OF PETITIONERS' FEDERAL EQUAL PROTECTION CLAIMS IN A DECISION INTERWEAVING BOTH FEDERAL AND STATE LAW GROUNDS, THEREBY ESTABLISHING A PROPER BASIS FOR THIS COURT'S JURISDICTION.

The petitioners raised both the federal Fourteenth Amendment and state equal protection claims before the trial court and the State Board of Workers' Compensation below. (App. 15A, 19A, 24A) After finding the equal protection clauses of the Georgia and United States Constitutions "substantially equivalent," the trial court concluded that O.C.G.A. § 34-9-265(b)(5) violated the Georgia Constitution and for prudential reasons determined that "it was not necessary" to reach petitioners' federal constitutional claims. (App. 19A) *C.f., Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936) (Brandeis, H. concurring).

Respondent Barge-Wagener's subsequent Application for Discretionary Appeal to the Georgia Supreme

Court clearly recognized that the parallel federal constitutional claim would per force be decided by the Court. In fact, a seven page section of the Application is entitled "O.C.G.A. § 34-9-265(b)(5) is not unconstitutional under the Equal Protection Clause of the Federal Constitution."

Upon granting the Application for Discretionary Review, the Georgia Supreme Court specifically requested that the parties direct their appellate briefs to the state constitutional equal protection issue raised by the case. (App. 1B, Order of the Georgia Supreme Court granting discretionary appeal, included herein as a supplemental appendix). Petitioners Morales' briefs before the Georgia Supreme Court thus properly focused on the state constitutional issue posed by the case, pursuant to the Court's precise directive on this issue.[1] However, the underlying federal claim clearly remained at issue as it was integrally intertwined with the state equal protection claim and federal constitutional analysis urged by the parties. Additionally, the federal question was preserved in the trial court's judgment and record expressly accepted for review by the Supreme Court. By order of the Superior Court, the full record of the lower court and administrative proceedings and briefs had been transmitted for the Supreme Court's review.[2] (App. 3B, included herein).

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[1] In arguing that the Georgia Supreme Court should follow *de Ayala v. Florida Farm Bureau Casualty Insurance Co.*, 543 So.2d 204 (1989), petitioners also pressed the Court to adopt *de Ayala's* application of federal "strict scrutiny" equal protection analysis of the disparate treatment of workers on the basis of alienage under O.C.G.A. § 34-9-265(b)(5).

[2] The record, therefore, included briefs and pleadings submitted on behalf of Petitioners Morales to the Superior Court

Respondent's allegation that petitioners Morales failed to comply with Georgia Supreme Court Rule 45 and thereby abandoned their federal constitutional claim is blatantly wrong. Rule 45 applied solely to Barge-Wagener's responsibility, *as the appellant* before the Supreme Court, to identify the "enumerations of error" below which it wished to challenge.

Justice Benham's dissent clearly recognized that the Court had in fact disposed of *both* the federal and state constitutional equal protection claims:

> This matter is before the court mainly to determine whether OCGA § 34-9-265(b)(5) violates the Equal Protection Clauses of the Georgia Constitution and the United States Constitution . . . .
>
> We must determine . . . whether this dissimilar treatment rises to the level of constitutional impermissibility. The claim is made that this conduct is violative of the Equal Protection provisions of both the Georgia Constitution and the Fourteenth Amendment of the United States Constitution, *which provisions are, as the majority points out, substantial equivalents.*

(App. 8A, 11A) (emphasis added).

Under controlling Georgia precedent, if the judgment of the Superior Court is "right for any reason [it] must be affirmed." *Shapiro v. Lipman*, 377 S.E.2d 673 (1989); *Simmons v. Boros*, 341 S.E.2d 2 (1986); *Dunwoody-Woodlands*

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and State Workers' Compensation Board expressly identifying the Fourteenth Amendment equal protection claims and issues as well as state constitutional claims raised by the case.

Condo Assn. v. Hedquist, 403 S.E.2d 893 (1991). This is consonant with "the policy of both appellate courts in Georgia . . . to reach the merits of every case when it can be done consistent with the mandate of the law." *Holcomb v. Gray*, 214 S.E.2d 512 (1975). The Supreme Court therefore by definition reached and rejected the petitioners' federal constitutional claims when it reversed the judgment below – with the full record before it, including the Fourteenth Amendment constitutional issues addressed but not reached by the Superior Court.[3]

The Georgia Supreme Court would have affirmed the Superior Court judgment under the "right for any reason" affirmance requirement if it had concluded that the Superior Court judgment could be sustained based upon petitioners' underlying federal claims preserved in the record. The Court's straight reversal of the Superior Court judgment instead meant that the petitioners' federal as well as state constitutional claims had necessarily been reached and rejected.

This Court's jurisdiction is established "regardless of whether a party raised below and argued a federal-law issue that the state supreme court actually considered

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[3] *Webb v. Webb*, 451 U.S. 493 (1981), cited by Barge-Wagener in support of its claim abandonment argument, is simply inapposite here. In *Webb*, the petitioner, although obligated *as the appellant* to raise the errors below before the Georgia Supreme Court, never explicitly raised or briefed a federal constitutional claim in *any* state court proceedings. In contrast to the instant case, *neither* the majority nor dissenting state court opinion in *Webb* indicated an awareness that any federal question was directly or indirectly presented by the case, as noted by this Court. Id. at 495.

and decided." *Cohen v. Cowles Media Co.*, ___ U.S. ___, 115 L.Ed.2d 586, 595-96 (1991) and cases cited therein; *Webb's Fabulous Pharmacies Inc. v. Beckwith*, 449 U.S. 155, 159 n.5 (1980); *Orr v. Orr*, 440 U.S. 268, 274-75 (1979). "[I]t is not necessary that the ruling shall have been in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough." *People of State of New York v. Zimmerman*, 278 U.S. 63, 67 (1928).[4]

Furthermore, the federal equal protection questions posed by this case were raised and passed upon by the state courts below as issues wholly interrelated to disposition of the co-extensive state equal protection claim.[5] A federal question is thus "necessarily decided," as in the instant case, where the question is injected into the case due to the intertwinement of federal and state law issues or the existence of parallel federal and state constitutional

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[4] Barge-Wagener's response brief thus incorrectly summarizes the current jurisdictional jurisprudence of this Court when it says: "To be clear, this Court requires that such federal question be *both* raised and passed upon by the court below." (Appellee's Response to Petition at page 9) (emphasis added). However, if there is any doubt regarding whether the federal equal protection claim was presented, the record as a whole here affirmatively demonstrates that the federal question was indeed presented to and passed upon by the Georgia courts and on terms consistent with the briefing directive of the Georgia Supreme Court. *See, Street v. New York*, 394 U.S. 576, 581-82 (1969); *People of New York v. Zimmerman*, 278 U.S. at 67.

[5] As the Georgia Supreme Court treated the federal and state equal protection provisions as co-extensive in reviewing the constitutionality of O.C.G.A. § 34-9-265(b)(5), special federal-state comity concerns are not implicated by review of this case.

provisions. *E.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. at 159 n.5 (generalized due process arguments regarding Florida Constitution and its federal counterpart established jurisdiction for review of federal issue *despite fact that Federal Constitution not mentioned in the state court opinion*); *Cohen v. Cowles Media Co.,* 115 L.Ed.2d at 595-596 (where state court decision based upon construction of state claim in conjunction with the First Amendment defense, federal constitutional issue deemed presented); *First Lutheran Church v. Los Angeles County,* 482 U.S. 304, 313 n.8 (1987), (state court dismissal of state constitutional claim raised federal question because, in dismissing the claim, the court considered whether state court precedent governing the decision was contrary to recent decisions construing the federal constitution).

In the present case, not only did the Georgia Supreme Court's decision "necessarily decide" the petitioners' federal claim, it expressly rested its holding on the federal constitutional analysis urged by Barge-Wagener in defense of the statute. Thus, the majority concluded that Petitioners' constitutional claims were barred by controlling federal law, contrary to the dissent's view that the statutory scheme violated the Fourteenth Amendment. ("The U.S. Constitution 'expressly accord[s] differing protections to aliens than to citizens' *U.S. v. Verdugo-Urquidez,* 494 U.S. 359 (110 SC 1056, 108 LE2d 222 (1990). . . . The United States Supreme Court . . . has been clear that it is the alien's presence within its territorial jurisdiction that gives the Judiciary power to act. *Johnson v. Eisentrager,* 339 U.S. 763, 770-71 (70 SC 936, 94 LE 1255 (1950)"). (App. 5A)

For these same reasons, it is palpably clear that the Georgia Supreme Court's decision was so "interwoven" with federal law that it could not rest on an independent and adequate state ground. As reformulated in *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), the Court's "independent and adequate state grounds" doctrine provides that:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Respondent's independent and adequate state grounds argument is directly refuted by the Georgia Supreme Court's reliance on federal constitutional law in construing the scope of constitutional protection afforded under federal and state equal protection provisions deemed equivalent.[6] Further, the Georgia Supreme Court's decision lacks the "plain statement" required by *Long* that its reference to federal precedent is merely for guidance. *Id.* at 1042. *C.f., Pennsylvania v. Muniz*, 496 U.S.

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[6] *See also, Grissom v. Gleason*, 418 S.E.2d 27, 29 (1992) (reiterating that the Equal Protection Clauses of the United States and Georgia Constitutions are co-extensive but not foreclosing the possibility that the state provision in the future may be more broadly construed). Indeed, petitioners' unsuccessful motion for reconsideration clearly sought to persuade the Court, at a minimum, to construe the state Equal Protection Clause more broadly than the Court believed federal law required.

582, 588 n.4 (1990) (state court decision did not rest on independent and adequate ground where self-incrimination provisions of state and federal constitution viewed as identical); *Zacchini v. Scripps-Howard*, 433 U.S. 562, 568 (1977) (jurisdiction properly established where state law applied in light of federal constitutional considerations although state court judgment ultimately rested on state law). *See also, Quinn v. Millsap*, 491 U.S. 95, 102 n.6 (1989); *Delaware v. Prouse*, 440 U.S. 648, 652-53 (1979).

III. THE ALLEGED REMITTITUR PROCEDURAL DEFAULT ARGUED BY APPELLEE IS SIMPLY NON-EXISTENT.

Barge-Wagener's contention that Rule 61 of the Georgia Supreme Court Rules is a mandatory state procedural requirement is simply erroneous. The Rule's language is facially permissive, not mandatory, consistent with the varying need for stays in different cases. If a party elects not to stay the remittitur when a State Supreme Court decision is appealed to the United States Supreme Court, an alternative remittitur procedure has been approved by Georgia's appellate courts. The remittitur of the United States Supreme Court is directly transmitted to the trial court for implementation, pursuant to *Curry v. Construction & General Laborers Union*, 131 S.E.2d 559 (1963) and *The State v. Stewart*, 398 S.E.2d 270 (1990), on appeal after remand from the Supreme Court, 411 S.E.2d 110 (1992).

IV. THE SUPREMACY CLAUSE ISSUE RAISED BY PETITIONERS IS INHERENTLY IMPLICATED BY THEIR FOURTEENTH AMENDMENT EQUAL PROTECTION CLAIM.

This Court's Fourteenth Amendment alienage discrimination jurisprudence has consistently recognized

that Supremacy Clause issues are inherently implicated by discriminatory state statutory schemes. *Graham v. Richardson*, 403 U.S. 365, 376-83 (1971); *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 419 (1948); *Truax v. Raich*, 239 U.S. 33 (1915). Accordingly, the Supremacy Clause issue raised by the Petition is a subsidiary issue embraced within the fundamental federal equal protection issue posed by this case and is thereby properly before the Court. *C.f., Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980); *Cuyler v. Sullivan*, 446 U.S. 335, 342-43 (1980); *Procunier v. Navarette*, 434 U.S. 555, 559-60 n.6 (1978).

V. CONCLUSION

The federal equal protection principles at stake in this case are pivotal in the Georgia Supreme Court's decision herein as well as in the conflicting decisions of all other state courts of last resort which have passed upon this fundamental equal protection question raised by the Petition. The Petition for Writ of Certiorari properly presents important federal constitutional questions within the Court's jurisdiction to review.

Dated: Atlanta, Georgia, October 29, 1993.

Respectfully submitted,

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Counsel for Petitioners

APPENDIX

SUPREME COURT
STATE OF GEORGIA
STATE JUDICIAL BUILDING
ATLANTA 30334

Harold G. Clarke, Chief Justice
Charles L. Weltner, Presiding Justice
Richard Bell
Willis D. Hunt, Jr.
Robert Benham
Norman S. Fletcher
Leah J. Sears-Collins
Justices

Joline B. Williams, Clerk
Wm. Scott Henwood,
Reporter

OCT 7 1992

TO ALL COUNSEL:

RE: Application No. S92D1530. , Barge-Wagener Construction Co. et al. v. Julia Corpus De Morales

The Court today granted this application for discretionary appeal. Clarke, C.J., Bell, P.J., Hunt, Benham, Fletcher, and Sears-Collins, JJ., concur.

Your notice of appeal must be filed in the trial court within 10 days from this date. When the record is received from the trial court and docketed in this Court you will be sent a docketing notice showing the date of docketing and the Case Number assigned. The appellant's enumeration of errors and briefs will be due in this Court within 20 days from the date of docketing; the appellee's briefs will be due within 40 days from the date of docketing or within 20 days after the appellant's briefs are filed, whichever is later.

The Court is particularly concerned with, and requests that you address in your briefs, the following:

Whether OCGA § 34-9-265 (b) (5) violates equal protection under the Georgia Constitution?

Joline B. Williams, Clerk

BY: Lynn M. Stinchcomb

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

IN RE: JOSE ANTONIO MORALES, (Deceased Employee), with JUAN ANTONIO MORALES, Claimant, (Dependent Child), DANIEL MORALES, (Dependent Child), and JULIA CORPUS DE MORALES, (Widow/ Claimant),	:	FULTON COUNTY SUPERIOR COURT CIVIL ACTION FILE NO. E-03875
Appellee/Claimant,	:	STATE BOARD OF WORKERS COMPENSATION CLAIM NO. 451-93-5853
v.	:	(Filed Nov. 4, 1992)
BARGE-WAGENER CONSTRUCTION COMPANY,	:	
Appellant/Employer,	:	
and	:	
ARGONAUT INSURANCE COMPANY,	:	
Appellee/Insurer.	:	

ORDER TO THE CLERK OF SUPERIOR COURT TO TRANSFER THE ENTIRE FILE OF THE STATE BOARD OF WORKERS' COMPENSATION TO THE SUPREME COURT OF GEORGIA

The Supreme Court of Georgia has granted an Application for Discretionary Appeal of the Order of this Court in the above-referenced case. In order to facilitate the docketing of this Appeal with the Supreme Court, the Clerk of Fulton County Superior Court is hereby ordered

to forward both the complete file and record of the State Board of Workers' Compensation, and the complete file and record of the Superior Court to the Supreme Court.

This the 2nd day of ~~October~~ November, 1992.

/s/ Don A Langham
DON A. LANGHAM, JUDGE
SUPERIOR COURT OF
FULTON COUNTY